

# Center for Regulatory Effectiveness

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September 29, 2004

Mr. Michael David Gallagher  
Assistant Secretary for Communications and Information (Designate)  
National Telecommunication and Information Administration  
United States Department of Commerce  
Room 4898  
1401 Constitution Avenue, N.W.  
Washington, DC 20230

Dear Mr. Gallagher:

Rc: Appeal of NTIA Decision on CRE Request for Correction of Information Under the  
Data Quality Act

We appreciate NTIA's timely response to our request for correction of financial information disseminated by the National Telecommunications and Information Administration (NTIA). This document constitutes an appeal of the NTIA response.

*The relief we are requesting is twofold: first, we want a declaration by NTIA that ICANN is subject to the Data Quality Act; and second, as relief, we want an explanatory note added to ICANN's website regarding its financial statements, specifically discussing how it accounts for its accounts receivable data.*

The basic issue behind our petition is that CRE believes that Internet Corporation for Assigned Names and Numbers (ICANN) is subject to NTIA's "Section 515 Standards: Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the National Telecommunications and Information Administration." We also believe that NTIA has the discretion to allow ICANN to issue and administer their own Data Quality guidelines under the Agency's supervision.

Moreover, we are deeply concerned that NTIA's "response" to our petition violates a Supreme Court decision and, thus, does not constitute a lawful response to our petition. Specifically, the Agency has not explained why it has come to the conclusion that the information in question is not subject to the Data Quality Act. The Court, in discussing the scope of review under the "arbitrary and

capricious” standard, ruled that “Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>1</sup>

NTIA’s “response” to our petition for correction of information under the Data Quality Act did not articulate a satisfactory or other explanation of the relationship between the facts presented in our petition and the Agency’s decision. Furthermore, the NTIA letter did not include a “rational explanation” between the facts found and the choice made by the Agency. Instead, NTIA’s letter simply contained an unexplained and unjustified declaration that the information in question was “not disseminated by NTIA.”

NTIA provided us with their declaratory response even though we clearly and factually demonstrated that the ICANN financial data in question fully complies with the NTIA’s definition of agency disseminated information under the Data Quality Act. Specifically:

1. Agency Disseminated Information Includes Data Disseminated by Third-Parties Under NTIA Sponsorship. We quoted the section of NTIA’s Standards which defines define “dissemination” as an “agency initiated or *sponsored* distribution of information to the public.”<sup>2</sup>
2. NTIA’s Definition of Agency Sponsored Information. The request for correction also cited the portion of NTIA’s Standards that defined an “agency sponsored” distribution of information as referring “to situations where the Agency has directed a third party to distribute or release information, or where the Agency has the authority to review and approve the information before release.”<sup>3</sup>
3. NTIA’s Authority to Review and Approve ICANN’s Accounting Data. The request for correction clearly cited the specific clause in the Department of Commerce’s contract with ICANN that gives NTIA not only the authority but also the duty to review ICANN’s accounting data, “The Government will review the contractor’s accounting data at anytime fees are charged to verify that the above conditions are being met.”<sup>4</sup> Moreover, as the request for correction explained, since the Agency is reviewing ICANN’s accounting data to assess the corporation’s compliance with

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<sup>1</sup> Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Insurance, 463 US 29, 43 (1983).

<sup>2</sup> [http://www.ntia.doc.gov/ntiahome/occ/ntiaiqguidelines\\_09252002.htm](http://www.ntia.doc.gov/ntiahome/occ/ntiaiqguidelines_09252002.htm), page 2. (emphasis added)

<sup>3</sup> *Ibid.* (emphasis added)

<sup>4</sup> National Telecommunications and Information Administration, Order For Supplies Or Services, Order No. DG1335-03-SE-0336, Section C.2.1. (emphasis added).

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contractual requirements, NTIA has a concomitant right and duty to approve (or disapprove) the data.

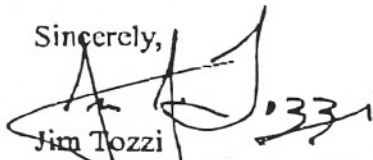
Since ICANN's accounting data precisely fits NTIA's definition of Agency sponsored (and hence Agency disseminated) information, it is inexplicable to us why you have stated that "These financial statements are not information disseminated by NTIA."

We appreciate the difficulty in changing audited financial statements. It is for this reason that we *provided the option of keeping the statements in their present form* but merely putting in an explanatory footnote on the ICANN website discussing the concerns regarding ICANN's accounts receivable data that their own accounting firm of Bremer & Hockenberg made repeatedly, that over one-third of ICANN's accounts receivable in 2003 were more than 180 days past due, were "based primarily on verbal understandings" and "are not supported by written agreements."

We feel that we have provided a reasonable option for resolving this issue in an efficient manner, i.e. adding a note to ICANN's website. However, NTIA can not escape their responsibility for ensuring that the entities for which they have oversight authority comply with both the Data Quality Act and the spirit of the Sarbanes-Oxley Act. Failure of NTIA to exercise proper supervision over the ICANN's financial data would mean that the *government applies Sarbanes-Oxley standards to the private sector while applying pre-Enron standards to government entities.*

We realize that some may claim that making ICANN subject to the Data Quality Act is could be seen as an extension of American influence of the organization. Nothing can be further from reality. Applying the Act merely means that an affected person in any country has a basis for requesting a correction of data disseminated by ICANN. Furthermore, since we believe that NTIA has the authority to delegate Data Quality authority to ICANN, the decisions on requests for correction could be made by ICANN, not the US. Government.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Tozzi', with a stylized flourish extending from the end.

President, Multinational Business Services, Inc.

cc: Theodore William Kassinger  
General Counsel, Department of Commerce